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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

FRED WILSON et al.,

Real Parties in Interest.

No. B164712

(Los Angeles County Super. Ct.
No. NA050930)

ORIGINAL PROCEEDING; petition for writ of mandate. Petition granted.
Charles D. Sheldon, Judge.

Steve Cooley, District Attorney, Fred Klink and Roberta Schwartz, Deputy
District Attorneys, for Petitioner.

Janice Y. Fukai, Alternate Public Defender, Michael Goodman and David Cho,
Deputy Alternate Public Defenders, for Real Parties in Interest.

No appearance for Respondent.

The People of the State of California petition for a writ of mandate directing the superior court to vacate its order severing real party in interest Fred Wilson's trial from that of his codefendant, David Jonathan Harris. Because the superior court abused its discretion in severing Wilson's trial, we grant the petition.

FACTS AND PROCEDURAL HISTORY

Wilson and Harris are each charged with two counts of murder and three counts of robbery. The information includes special circumstance allegations of murder in the commission of a robbery. On December 10, 2002, Wilson filed a motion requesting severance of his trial from Harris's trial. The sole basis for that motion was an allegation that Harris had made a statement to police implicating himself and another individual, readily identifiable as Wilson, in the murders, and that Wilson would be unable to cross-examine Harris on his statement should it be introduced during a joint trial, raising so-called *Aranda* error.¹ At a hearing on that motion, the prosecution indicated it did not plan to use Harris's statement, and so Wilson's counsel agreed the motion was moot. Rather than deny the motion, however, the trial court simply cautioned that if the prosecution should alter its stance, it should let the parties know as early as possible, and continued the motion to January 28, 2003, the date set for trial.²

On January 28, 2003, the trial court first considered a motion by Harris to continue his trial because he needed to conduct further investigation of the facts leading up to the commission of the crimes. After receiving additional information during in camera hearings with Harris's counsel regarding the need for further investigation, the trial court determined in open court that good cause supported a continuance for Harris. The trial

¹ *People v. Aranda* (1965) 63 Cal.2d 518.

² In accordance with the notice given in the alternative writ of mandate, issued February 20, 2003, the court takes judicial notice of the superior court file.

court then stated, “So now I want to hear and decide whether I should sever the case.” In response, Wilson’s counsel reminded the trial court that the motion to sever had been deemed moot after the prosecution had agreed not to use Harris’s statement to police. The prosecution confirmed that it would not use the statement in its case-in-chief. Wilson’s counsel further acknowledged that should Harris testify, so that the statement might become eligible for use by the prosecution, there would be little he could do to prevent the statement’s admission into evidence, as he too would be able to cross-examine Harris.

Nevertheless, the trial court severed Wilson’s trial from Harris’s. In response to the prosecution’s objection, the trial court stated the reasons for its ruling were the “non-judicial economy” inherent in having two defendants in a special circumstance case tried together, including the complexities of jury selection in such cases, and the possibility *Aranda* error might occur. In addition, the trial court stated, “I believe with a long continuance that I feel I must grant [to Harris] and the other things I just mentioned . . . this one should be severed. We should go forward with the first defendant and then grant the rather lengthy continuance to [counsel for Harris] who has given me good cause for a lengthy continuance.” “I think on balance, everything considered, these cases should be severed so we can try one case and then have the other case after the continuance tried separately.” The trial court thereupon considered the length of the continuance Harris should receive, first proposing a seven-week continuance to March 18, 2003, but ultimately extending it to April 17, 2003, to accommodate the prosecution’s schedule. The following day, the trial court issued another minute order citing the potential for conflicting defenses as an additional basis for its severance order. This petition followed.

DISCUSSION

There is a statutory preference for joint trials. (Pen. Code, § 1098.) A case involving defendants charged with common crimes, common events, and common victims is a “classic case” for a joint trial. (*People v. Hardy* (1992) 2 Cal.4th 86, 168.)

Penal Code section 1050.1 provides in pertinent part: “The court . . . shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears . . . that it will be impossible for all defendants to be available and prepared within a reasonable period of time.” “We review the court’s rulings on the motion[] for separate trials for abuse of discretion.” (*People v. Morganti* (1996) 43 Cal.App.4th 643, 671-672.) In exercising its discretion, the trial court should consider (1) whether there is an incriminating confession by a codefendant; (2) whether there may be prejudicial association with codefendants; (3) whether there is a likelihood of confusion resulting from evidence or multiple counts; (4) whether there may be conflicting defenses; and (5) whether there is a possibility that at a separate trial a codefendant would give exonerating testimony. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.)

In this case, there was no motion for severance pending. It is true that Wilson had previously made a motion for severance on the ground of *Aranda* error. However, the motion had become moot when the prosecution committed to exclude any statements of Harris from the case-in-chief. It is also true that the trial court had continued the severance motion, but the purpose of the continuance was to ascertain that the prosecution had not changed its position concerning Harris’s statements. The prosecution had not changed its position. The motion was not brought on the grounds of “non-judicial economy,” the continuance of Harris’s trial, or the possibility of conflicting defenses. Thus, the prosecution received no notice or opportunity to respond to these new grounds.

Moreover, the continuance of the trial to April 17, 2003, cannot be said to be an unreasonable amount of time to allow Harris’s counsel to finish preparing for a joint trial given the circumstances of the case and the magnitude of the issues presented. Wilson did not object to a continuance. We conclude Penal Code section 1050.1 controlled, and the trials should have remained joined.

Nor do the additional reasons the trial court advanced to justify severance support the trial court's order. Any *Aranda* error that might have arisen from the prosecution's use of Harris's statement was removed by the prosecution's promise not to use that statement in its case-in-chief. (See *People v. Box* (2000) 23 Cal.4th 1153, 1195-1196.) There was no evidence of prejudicial association, likelihood of confusion, or exonerating testimony. The trial court's wish to avoid the complexities attending a joint trial of defendants in a special circumstance case is not sufficient basis to warrant severing the trials. The trial court's apparent preference to try the two special circumstance murders separately does not support a severance. The belatedly asserted possibility that conflicting defenses might be advanced at trial was never advanced by Wilson as a ground for severing trial and is unsupported by the record.³ The record simply fails to support the severance of the trials. Accordingly, the trial court abused its discretion.

DISPOSITION

The petition for writ of mandate is granted. The trial court is directed to vacate its January 28, 2003 order severing the two cases. The stay of proceedings is dissolved. This decision shall become final immediately upon filing. (Cal. Rules of Court, rule 24(b)(3).)

NOT TO BE PUBLISHED.

GRIGNON, Acting P. J.

We concur:

ARMSTRONG, J.

MOSK, J.

³ We have reviewed the sealed transcripts of the in camera hearings in which the trial court considered Harris's need for further investigation, but nothing in those transcripts supports any conclusion that conflicting defenses would be advanced at trial sufficient to support severance.